No. 20-1214

IN THE

Supreme Court of the United States

FRED J. EYCHANER,

PETITIONER,

V.

CITY OF CHICAGO,

RESPONDENT.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONER

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April 13, 2021

QUESTION PRESENTED

1. Is the possibility of future blight a permissible basis for a government to take property in an unblighted area and give it to a private party for private use?

2. Should the Court reconsider its decision in *Kelo v. City of New London*, 545 U.S. 469 (2005)?

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INTEREST OF THE *AMICI CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center located in Chicago, Illinois that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018).

Amicus are interested in this case because the protection of private property rights is a core value vital to a free society. To that end, the Liberty Justice Center represents property owners in a variety of cases around the country. *See, e.g. Mendez v. Chicago*, No. 2016 CH 15489, Circuit Court of Cook County, Illinois.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sixteen years ago, a bare majority of this Court licensed state governments to take from the poor and give to the rich. Under *Kelo,* the "specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting). The majority opinion

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amicus funded its preparation or submission. All parties received timely notice of amici's intent to file and consented to the filing of this brief.

"eliminate[d] liberties expressly enumerated in the Constitution," for "[i]f such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution." *Id.* at 506 (Thomas, J., dissenting). As Petitioners explain, few recent decisions of this court have been more universally condemned— from the left to the right, the academy to ordinary citizens. *See* Pet. at 26.

Stare decisis is "not an inexorable command." *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). While respect for precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), this Court has repeatedly outlined circumstances under which these values must give way to more acute considerations and has not hesitated to jettison misbegotten precedent. *See Janus*, 138 S. Ct. at 2486. The doctrine is not "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). "If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). *Amicus* submits this brief to emphasize that *Kelo* is ripe for this Court's reconsideration.

Amicus also submits this brief in order to emphasize the empirical failure of 'future blight' determinations. Headquartered in Chicago, the Liberty Justice

Center's offices are not far from the property at issue. As Petitioners point out, rather than being blighted, the neighborhood in this case has thrived in the past two decades. *See* Pet. at 10, 22. This Court should look askance at local government's claim to a crystal ball—they have no greater ability to predict the course of complex economic system than a Court, and should not be allowed to make politically convenient guesses.

ARGUMENT

I. *Kelo* was poorly reasoned and there is wide consensus that it was in error and should be overruled.

Usually, a decision of this court that unites all sides to its derision involves some long-ago ruling based on the received wisdom of the time which experience has shown to be benighted. *See, e.g. Buck v. Bell*, 274 U.S. 200 (1927). Yet *Kelo* attained infamy in its own time as "probably the most universally despised Supreme Court decision in decades." Alberto B. Lopez, *Revisiting* Kelo *and Eminent Domain's "Summer of Scrutiny"*, 59 Ala. L. Rev. 561, 562 (2008). "No other Supreme Court decision has ever led to such a broad legislative reaction." Ilya Somin, THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN 3 (2015).

Indeed, the backlash was swift—and bipartisan.[2] The decision was denounced by Ralph Nader and Rush

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[2] Indeed, Counsel of Record for Amicus was an intern at the law firm representing Ms. Kelo at the time the Court's decision was issued and recalls a poll on the front page of CNN's

Limbaugh, Howard Dean and Bernie Sanders. Somin, THE GRASPING HAND at 137. Many jurisdictions quickly attempted to put some limits on the dangers *Kelo* created: "[i]n the years following the decision, both the federal government and forty-five states passed new laws limiting the using of eminent domain." *Id.* 3. Unfortunately, these efforts often fell short, failing to provide more than symbolic limits on the power of governments to take property. *Id.*

The reason for this bipartisan consensus is straightforward: these sort of economic development takings are unfair from any angle one looks at them. They don't simply undermine the promises of rights in property that was fundamental to our founding principles, they do so by transferring wealth and power to the politically powerful at the expense of the weak. As Justice Thomas explained in his dissent,

> Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. *Id.*, at 28-29. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, *Poletown: Community Betrayed* 58 (1989). Urban renewal projects have long been associated with the displacement of

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website finding only one percent of responders thought that the government should be able to seize private homes or businesses for private development. *See* Les Christie, "Taking your home away," CNN (Aug. 3, 2005), https://money.cnn.com/2005/07/25/real_estate/investment_prop/eminent_domain_v_deveopment/index.htm.

> blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'" Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman*[*v. Parker*] were black. 348 U.S., at 30, 99 L. Ed. 27, 75 S. Ct. 98. Regrettably, the predictable consequence of the Court's decision [in *Kelo*] will be to exacerbate these effects.

Kelo, 545 U.S. at 522 (Thomas, J., dissenting).

If these terrible outcomes were somehow compelled by the text of the Fifth Amendment, or by clear precedent, perhaps this Court's role would be simply to concede that the Constitution cannot always provide the answers one would like. But *Kelo*'s reasoning demonstrates no such compulsion. Instead, it leans on poor analogies to a few earlier cases. The Court in *Kelo* claimed that there was "no principled way of distinguishing economic development from the other public purposes that we have recognized." 545 U.S. at 484. An examination of the relevant cases shows otherwise.

First, in *Berman v. Parker*, 348 U.S. 26 (1954), this Court addressed the District of Columbia' 'slum clearance' program. Amicus submits that *Berman* was in error for many of the same reasons *Kelo,* and the opinion in this case, were in error—and the passage above from Justice Thomas emphasizes the racial and socioeconomic inequities these sorts of "anti-blight" initiatives created—but even taking *Berman* in tow, the facts the Court confronted were simply different in kind:

> In 1950 the Planning Commission prepared and published a comprehensive plan for the District. Surveys revealed that in Area B, 64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, 83.8% lacked central heating. In the judgment of the District's Director of Health it was necessary to redevelop Area B in the interests of public health. The population of Area B amounted to 5,012 persons, of whom 97.5% were Negroes.

Berman, 348 U.S. at 30. The facts, as the Court in *Berman* understood them, were that more that 80% of the homes in question were *uninhabitable*. The program in *Berman* was a *public health* measure, which this Court recognized as within the scope of traditional municipal police powers. *Id.* at 32. The Court in *Kelo* took a precedent about homes that didn't have enough heat to keep people from freezing in winter, and transformed it into a general license to replace residents who were economically inconvenient.

The *Kelo* Court also relied on *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984). Because of some idiosyncrasies of Hawaii's feudal and colonial history, nearly all the land not owned by the federal government was owned by a small number of individuals. The Hawaii government instituted a plan to break up this oligopoly, by which people leasing from the oligopolists could purchase the homes they were living in. *Id.* at 234. The Court found that "reduc[ing] the perceived social and economic evils of a land oligopoly traceable to

[Hawaii's] monarchs" was a valid use of the state police power. *Id.* at 241-2.

Again, amicus would submit that "*Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States." *Kelo*, 545 U.S. at 519 (Thomas, J., dissenting). But even accepting the premise of these earlier cases, *Kelo* was in error. As with the public health efforts in *Berman*, the kind of antitrust-style interest espoused in *Midkiff* has some basis in traditional forms of state regulation. As with extant health and safety issues, perhaps government can try and resolve longstanding social conflicts related to the very particular history of a state—conflicts whose complications that this court has had to confront more than once. *See, e.g. Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 166 (2009). As Justice O'Connor explained,

> "[i]n both those cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society--in Berman through blight resulting from extreme poverty and in Midkiff through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm.

545 U.S. at 500 (O'Connor, J., dissenting). But *Kelo* lacked any link to a traditional police power, and was not addressed to any special or extreme harm. Rather, the City of New London decided they'd rather serve the purposes of a corporation than the individual citizens who currently lived in their community. *Id.* at 469. The Court held "that the sovereign may take private property currently put to ordinary private use, and give it

over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public--such as increased tax revenue, more jobs, maybe even esthetic pleasure." *Id.* at 500 (O'Connor, J., dissenting).

The root flaw that lead the Court astray is the conflation of "use" with "purpose," which it came to employ interchangeably despite the fact that they are distinct concepts. Certainly, anything *could* serve *some* public *purpose*, at least in the abstract. Justice O'Connor's dissent rightly points out that, at the level of generality adopted by the Court, simply transferring property from poor to rich, or from small companies to larger, can be justified by the increase in tax base. *Id.* at 503. But one need not even be so constructive: if increasing taxes is the end goal, one could simply seize and raze homes to create scarcity and drive up the property values for politically preferred homeowners. No policy will ever serve the purposes of the *entire* public, as the public is made up of many individuals with their own needs and preferences. *See Id.* at 501 ("nearly any lawful use of real private property can be said to generate some incidental benefit to the public"). The City will always be choosing between the purposes of various segments of the public—and it does not require much deduction to realize this will mean the purposes of the wealthy and politically connected over the purposes of those in the truest need.

Nor is *Kelo*'s supposed respect for state prerogatives persuasive. The court invoked "a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." 545 U.S. at 482. But subsidiarity is not an end in itself—rather, this Court holds that

the division of authority is a *means* of securing the rights of citizens. "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of lawful powers, that liberty is at stake." *Bond v. United States*, 564 U.S. 211, 221–22 (2011) (cleaned up). *Kelo* turns this core principle on its head: it justifies the abrogation of property rights by reference to local government prerogatives, elevating the means above the ends.

This Court should grant the petition, take this opportunity to clarify that local government is not entitled to deprive citizens of their most basic property rights on the whim of political convenience.

II. Courts should not allow local government to take property based on their unreliable prediction as to what property may or may not be blighted in some uncertain future.

This Court should also grant the petition because the empirical facts of this case demonstrate the inability of planners to predict which areas will someday become blighted. In *Kelo*, the planners asked this Court to trust their wisdom, and when given the benefit of the doubt they razed the working-class homes of New London, and what was left a decade later were barren lots inhabited only by a colony of feral cats. Somin, *The Grasping Hand* 235. In this case, the City's decades-long failure to take the land lasted long enough to watch the blighted future of River West turn towards a bustling hub of prosperity. Yet the planners come to

this court and ask that it rubber-stamp their *failed prediction*.

This Court should not permit localities to guess at which areas may or may not one day need intervention, and to intervene merely on that guess—especially since they aren't very good at guessing. Yet they ask this court to affirm their power to take which every property they wish, for whatever politically convenient purposes they wish, subject to trust rather than scrutiny. "This is not the rebuilding of cities. This is the sacking of cities." Jane Jacobs, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 6 (1961). To grant the City the power to take property based on a prediction that failed to come true would flirt dangerously close to farce.

The Property in question sits less than a mile and a half away from amicus' office in Chicago's bustling financial district. *See* Pet. at 4. In 1999, the City claimed this area was destined for blight, and so it had no responsible choice but to designate a manufacturing district to avoid some hypothetical possible future slum conditions. The hypothesis failed. Yet they have continued to pursue this case, and Mr. Eychaner's land, as River West grew up without them. The record as to the properties at issue exemplifies the City's cracked crystal ball: the initial jury to rule on the case awarded Petitioner $2,500,000. Pet. at 10. Six years later, at the retrial, the jury awarded $7,100,000 for the same property. Pet at 11. In a fraction of the relevant time period since the City predicted River West would be a future danger-zone, the value of the property nearly tripled.

Just across the street from the Bloomer Chocolate Factory sit multiple luxury residential buildings, with

Studio Apartments running upwards of $2,000.[3] A few blocks away one finds upscale restaurants where one can wash down $45 fish tacos with $22 cocktails.[4] Major chains like Starbucks and Dunkin' Donuts sell coffee to commuting professionals. There is even an indoor golf simulator.[5]

Not only is there no reason to think that government entities are any better at predicting whether properties will or will not become blighted in the future, but *Kelo* and other cases should caution this Court in trusting governments to predict whether they will follow through with their own plans.

Consider another Chicago neighborhood subject to eminent domain: the 3400 block of Bryn Mawr Avenue in Chicago's North Park neighborhood, seized in 2016 by Northeastern Illinois University, traditionally a commuter school that sought to build dormitories on the seized properties. Yet, five years later, NEIU has scrapped its unfulfilled plans to build dorms and has recently hired a firm to reassess its options for the properties it has forced to sit vacant for the last five years. Patty Wetli, *NEIU Wanted These Properties Badly Enough to Invoke Eminent Domain. They're Still Vacant, So Now What?*, WTTW, https://news.wttw.com/2021/01/25/neiu-wanted-these-properties-badly-enough-invoke-eminent-domain-they-re-still-vacant-so; see also, Illinois Policy, The

[3] See*, e.g.* Alta at K Station, available at https://www.altaat-kstation.com/.

[4] *See, e.g.,* The Dawson, available at https://the-dawson.com/.

[5] *See* My Chicago Golf, available at http://www.mychicagogolflesson.com/.

Taking of Bryn Mawr Avenue, https://www.youtube.com/watch?v=r4hdQglN2W0.

The facts here exemplify why this court should not allow local government to take unblighted property subject to their own prediction of future economic winds. Nor can Courts trust local government to admit when they got it wrong: they're still litigating this case based on their failed prediction. At the very least, court should not be forced to trust the wisdom of planners over what they can empirically see with their own eyes: there is not, and never has been, any blight here to begin with.

CONCLUSION

For the reasons stated above, and by Petitioner, the Petition should be granted.

Respectfully submitted,

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